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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/596,157

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Eric Thomas Best

112701-728

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09/08/2009

EXAMINER

PADEN, CAROLYN A

ART UNIT

PAPER NUMBER

1794

NOTIFICATION DATE

DELIVERY MODE

09/08/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/596,157	<b>Applicant(s)</b> BEST ET AL.	
	<b>Examiner</b> Carolyn A. Paden	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 12 July 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>12-11-06</u>  | 6) <input type="checkbox"/> Other: _____                          |

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-2 and 5-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stark (5,330,778 or 5,021,248 or 5,145,702).

Each of the Stark references is directed to the manufacture and use of microspheres. The '778 Stark reference will be specifically discussed in these rejection.

Stark discloses the manufacture of microspheres (see Figure 1). In example 17, frosting is prepared using zein microspheres. The frosting formulation contains sugar, vanilla extract and almond extract as well as zein powder. The frosting is certainly reduced in fat and is a coating. Although corn is the selected microsphere in these patents, other protein sources are contemplated at column 2, lines 40-42 and in the background of the invention. The claims appear to differ from Stark in the mouthfeel or taste the product. No unobvious or unexpected result is seen from the mouth feel of Stark and the mouthfeel of the claims. The Stark frosting is described as being "creamy". It is appreciated that chocolate is not the

flavor of choice in Stark but to prepare chocolate frosting using cocoa butter, cocoa corn syrup and sugar syrup would have been an obvious alternative to vanilla frosting. It is also appreciated that the milk in the frosting composition is not dried milk but no unobvious or unexpected result is seen from this feature. The coating is essentially dry and would be expected to have a low water activity because of the extent of sugar in the composition. Long shelf life is typical of dried foods with low water activity. Frosting is an expected coating for confectionery products. Exposure to the atmosphere would be expected to dry the coating to an anhydrous state.

Claims 1-13 and 15-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Singer (5171603).

Singer discloses that egg albumin is known in the art to form micro particles in the form of a sphere (column 1, lines 28-42). At example 5 in Singer, chocolate icing is formed. The icing contains corn syrup, sugar, flavor, cocoa powder and milk solids (Tables 2a and 2b). The claims appear to differ from Singer in the mouthfeel or taste of the product. No unobvious or unexpected result is seen from the mouth feel of Singer and the mouthfeel of the claims. The Singer composition is described as being

“smooth and emulsion-like” (column 2, line 7). It would have been obvious to one of ordinary skill in the art to utilize the micro particles of Singer as an obvious alternative to the micro particles in the composition of Stark to prepare chocolate icing. It is appreciated that powdered sucrose is not mentioned but no unobvious or unexpected result is seen from the use of sugar or sucrose generally and powdered sucrose.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is

available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794